IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1670

LUTTETUS PERRY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BELL, McSORLEY, HUDSON & DANIEL, P.C.
By: Edward F. Bell
Suite 840 - Buhl Building
Detroit, Michigan 48226
Phone: (313) 393-0900
Counsel for Petitioner

Interstate Brief & Record Co., 1615 Abbott St., Detroit, Michigan 48216
962-8745

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CITATIONS

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The Petitioner, LUTTETUS PERRY, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 31, 1977.

OPINION BELOW

The Opinions of the Court of Appeals of January 31, 1977 and of February 7, 1977 are set forth in Appendix "A," and Appendix "B."

JURISDICTION

On January 31, 1977, the Court of Appeals for the Ninth Circuit entered Judgment affirming the conviction of Petitioner for Conspiracy to Possess Heroin and Cocaine with Intent to Distribute, in violation of 21 U.S.C. Sections 841 (a) (1) and 846. The Petition for Rehearing was denied on April 7, 1977. On April 28, 1977, it was ordered that the time for filing a Petition for Writ of Certiorari be extended to June 3, 1977. This Petition for Certiorari is being filed within the specified time period. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

WHETHER WHEN IT LEARNED OF JURY MISCONDUCT AND POSSIBLE COMMUNICATIONS WITH NONJURORS THE PROCEDURES FOLLOWED BY THE TRIAL COURT WERE CONSTITUTIONALLY ADEQUATE TO UNCOVER JURY BIAS AND PREJUDICE AND TO GUARANTEE THE PETITIONER AN IMPARTIAL JURY AND A FAIR TRIAL.

WHETHER THE PETITIONER WAS DENIED A FAIR TRIAL WITHIN THE MEANING OF THE DUE PROCESS CLAUSE WHEN A KEY GOVERNMENT WITNESS RETESTIFIED ON REBUTTAL AND ALTERED HER PRIOR TESTIMONY AND WHEN THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN HER TESTIMONY WAS FALSE.

WHETHER THE PETITIONER WAS DENIED A FAIR TRIAL BY THE TRIAL COURT'S REFUSAL TO INSTRUCT ON MULTIPLE CONSPIRACIES WHEN THE JURY COULD HAVE FOUND A VARIANCE BETWEEN THE PROOFS AND THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in part, that:

> No person shall . . . be deprived of life, liberty or property, without due process of law;

The Sixth Amendment to the United States Constitution provides, in part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

STATEMENT OF THE CASE

On or about October 6, 1975, LUTTETUS PERRY and four (4) other Defendants were tried for conspiring with numerous other persons to violate Federal Narcotics Laws. The Indictment contained two (2) Counts: Conspiracy to Import Narcotics and Conspiracy to Possess Narcotics with Intent to Distribute.

While a Jury was being selected and after the prospective Jurors had been sworn, JUDGE NIELSEN asked them whether they would be able to follow the instructions as to the law that would govern (T.26). (All page references herein are to the Reporter's Transcript.) While JUROR JOHNSON expressed his willingness to follow the law he stated that he had overheard various conversations about the case and wished to be excused. In Chambers, Johnson said that he had overheard a conversation in the anteroom as well as a discussion between a woman and another gentleman (T.45). From the attitudes expressed, he was unable to be impartial. MR. JOHNSON was excused.

Immediately after this In-Chamber disclosure, counsel for the Defendants expressed their concern to the Court, out of the presence of the Jury, about the conversations MR. JOHNSON had overheard (T.48). JUDGE NIELSEN declined a request to inquire whether the remaining Jurors had heard the conversations or remarks in question and whether they had been affected by them (T.49).

After the Jury had been chosen, one of the alternates, MR. ZUBRICKY, disclosed that earlier he had heard MR. JOHNSON and another man talking about the case in the hallway (T.51). When questioned in Chambers,

MR. ZUBRICKY said he had children hooked on drugs and could not be fair. He had told this to another Juror, MRS. VAN DORN, while other members of the Jury Panel were present (T.51-52). MR. ZUBRICKY was excused, but the Court again refused to voir dire any of the Jurors, including MRS. VAN DORN, about anything they had overheard or any opinions they may have formed (T.53).

Counsel for the defense had exhausted all their challenges, and the Jury had already been selected and sworn, but the Court was asked for an additional challenge so that MRS. VAN DORN could be removed. When this was denied, defense counsel moved for a mistrial because of the strong possibilities that the Jurors had been discussing the case amongst themselves or with third parties, and had been exposed to information that prejudiced the Defendants. The Motion for a Mistrial was denied (T.59).

During its case-in-chief, the Goverment produced a number of witnesses, many of whom were named in the Indictment as conspirators. According to the testimony, a Mexican citizen, RAUL LEON-AISPURO, was the source of narcotics into California. He would supply drugs to others, including one EDWARD PERRY, who, in turn, was said to have delivered drugs to many of those named in the Indictment, including his cousin, the Petitioner.

Of all of the Government witnesses, only two (2), JUNE WRIGHT and LARRY JACKSON, could identify LUTTETUS PERRY. MS. WRIGHT testified about deliveries of drugs she had made to the Petitioner for EDWARD PERRY, drug conversations she had with Petitioner, and her drug free means of supporting herself since her arrest in this case (T.323,340,292,374).

The Defendants made a Motion for Judgment of Acquittal after the prosecution rested, and the Court partially granted that Motion by dismissing Count I as to all Defendants (T.1078).

As part of the defense, counsel for Petitioner presented evidence that JUNE WRIGHT had not visited the people and had not been at the places she testified about on direct and cross-examination as details of the drug deliveries to and drug discussions with the Petitioner (T.1092,1293,1273). The defense also established that her testimony concerning her means of supporting herself was untrue (T.1252,1254-1255).

To attempt to rehabilitate their star witness, the Government requested that JUNE WRIGHT be permitted to take the stand again on rebuttal (T.1297). Over a defense objection (T.1299), this was permitted. In support of his request, the U.S. Attorney had made an offer of proof as to what JUNE WRIGHT would testify to on rebuttal (T. 1297), but MS. WRIGHT later admitted that she had not told anyone what her testimony would be before she took the stand in rebuttal (T.1318).

On the witness stand for the second time, MS. WRIGHT changed her earlier testimony so that it conformed to the evidence presented by the defense. The Court denied a defense request to call a witness on surrebuttal who would establish that MS. WRIGHT was again lying (T.1384-1385).

Earlier, the defense had asked the Court to include in its conspiracy instructions some explanation of the difference between the proof of a single conspiracy and that of many separate and distinct conspiracies among common individuals (T.1241). The defense was of the opinion that it was essential for the Jury to be instructed

that proof of independent agreements between EDWARD PERRY and the Defendants or other alleged conspirators was not sufficient to convict the Defendants of conspiring together in a common scheme as the Indictment charged. Of particular concern was the likelihood that the Jurors would lump all the separate agreements into one, and apply the acts and declarations of all the alleged conspirators against the Defendants, even though they were not found to be parties to the conspiracy contained in the Indictment (T.1241-1245). The Court refused to instruct the Jury on multiple conspiracies (T.1245), and no such instructions were given to the Jury.

The Jury then convicted the Petitioner of conspiring to possess heroin and cocaine with intent to distribute.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW IS INCONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS DEALING WITH THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL AND UNBIASED JURY.

Petitioner does not contend that the above facts indisputably establish Jury bias, but rather, that he was denied a fair trial by an impartial Jury because of the failure to take those steps likely to uncover Jury prejudice once areas of seemingly probable prejudice were brought to the Court's attention.

> In a criminal case, any private communication, contact or tampering, directly or indirectly, with a juror during a trial about the matter pending

> before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the Court and the instructions and directions of the Court made during the trial, with full knowledge of the parties. *Remmer* v. *United States*, 347 U.S. 227, 229 (1954).

According to MR. JOHNSON, there was evidence of conversations between prospective Jurors and possibly outsiders, and yet the Trial Court did not even attempt to determine the identities of the people involved or the nature of the communication. That these communications were material is shown by the fact that one Juror who overheard them, MR. JOHNSON, declared himself no longer able to be impartial.

MR. ZUBRICKY told another Juror, MS. VAN DORN, that his children had drug problems and that he did not wish to sit on the case because of his bias against drugs. Whether any other Juror overheard this admission is unknown. The communication was clearly relevant to the instant drug charges and is particularly insidious in that it raised a concern about the Jurors children that could very likely affect their verdict. This improper extrajudicial conduct among Jurors is also presumptively prejudicial according to *Remmer* v. *United States*, *supra*, but the Trial Judge again failed to determine if any Jurors other than MS. VAN DORN had overheard the remark, and he did not see fit to question MS. VAN DORN about its effect on her.

A constitutional standard of fairness requires that a Defendant have a panel of impartial, indifferent Jurors. *Murphy* v. *Florida*, 95 S. Ct. 2031 (1975). Appellate tribunals have the duty to make an independent evaluation of the circumstances to determine the

probability of prejudice and whether the Trial Court responded adequately to curtail the chance of biased Jurors. *Marshall* v. *United States*, 360 U.S. 310, 312 (1959); *Sheppard* v. *Maxwell*, 384 U.S. 333, 362 (1966).

The object of voir dire examination is to determine the impartiality of the Jurors, to discover biased Jurors and to negate improper influences. While the Trial Judge has broad discretion as to voir dire:

> "(T)he exercise of this discretion, and the restriction upon inquiries at the request of counsel, (are) subject to the essential demands of fairness." (Citations omitted.) *United States* v. *Peterson*, 483 F2d 1222, 1227 (D.C. Cir. 1973).

When JUDGE NIELSEN learned that the Jury Panel may have been exposed to prejudicial information from outsiders or from fellow Jurors, the Court had a duty to first inquire whether any of the Jurors had participated in or overheard the conversations in question, and then to individually question those who responded. *Margoles* v. *United States*, 407 F2d 727, 735 (7th Cir. 1969); *United States* v. *Peterson*, 524 F2d 167, 176, 177 (4th Cir. 1975).

In *United States* v. *Peterson*, *supra*, like the reference in this trial to the drug problem of MR. ZUBRICKY's children, one Juror had told another "this reminds me of the Angela Davis Trial," and "I hope that I have not frightened you by saying that!" The Court of Appeals found no error where the Trial Court had questioned the Jurors involved who stated that the remark would not adversely affect their deliberations. In *United States* v. *Crisona*, 416 F2d 107 (2d Cir. 1969), a witness told the Court that she had heard Jurors discussing the case in the ladies restroom. The Court of Appeals affirmed the

conviction since the Trial Court had questioned the female Jurors *in camera* and found that the charge had no basis in fact. In *Jordan* v. *United States*, 408 F2d 1305 (D.C. Cir. 1969), a Juror had spoken to a witness and it was discussed by other Jurors. The District Court questioned the Jurors who all stated that they would not be affected. The Court of Appeals in *Jordan* found that the steps taken below had eliminated the possibility of prejudice.

The Trial Court here failed to follow even the first step of *Margoles* v. *United States*, *supra*, and therefore it is impossible to determine that nature of the information that prejudiced MR. JOHNSON, the number of Jurors that overheard MR. ZUBRICKY, or whether any of the Jurors were influenced or affected by the contents of those remarks and conversations. Asking the Jury to make a subjective finding of their own impartiality under these circumstances was not adequate to discover any unknown prejudice. It is the Trial Judge, not the Jurors, who is the final protection against Juror misconduct or prejudice. The Judge must ensure that the voir dire of the Jurors affords a fair determination that no prejudice has been fostered. *Silverthorne* v. *United States*, 400 F2d 627 (9th Cir. 1968). In certain instances calling for the Jurors' subjective assessment of their own impartiality does not adequately probe the possibility of prejudice. *United States* v. *Polizzi*, 500 F2d 859, 879 (9th Cir. 1974).

While this case does not involve pre-trial press publicity, the fact that one Juror disqualified himself should have been a sufficient indication of prejudice for the Court to have gone further than asking for the Jurors' subjective assessment of their own impartiality. In *Parker* v. *Gladden*, 385 U.S. 363 (1966), the fact that ten (10) Jurors testified that they had not heard a prejudicial

statement did not prevent a finding that the Defendant's Sixth Amendment rights to trial by an impartial Jury and confrontation of witnesses had been violated. Here, the Jurors were not even asked whether they had overheard the remarks or conversations in question. In *Turner* v. *Louisiana*, 379 U.S. 466 (1965), although two (2) Court Baliffs who had testified as witnesses swore that they had not spoken to the Jurors they were guarding, the convictions were reversed. Here, the Jurors were not voir dired beyond the normal, general inquiries even though there were strong indications that someone had been discussing either the case or the Defendants.

This case is unlike *Ristaino* v. *Ross*, 47 L Ed2d 258 (1976), which held that it was not constitutionally required in every instance that Jurors be voir dired about racial prejudice. Since the Petitioner there was unable to point to any racial factors that would suggest a significant likelihood that racial prejudice might infect the trial, the *Ross Court* concluded that a more generalized but thorough inquiry into impartiality was proper. Here, one Juror was discharged because of what he had overheard and one Juror was excused after he had told another of his family drug problems and his personal bias against drugs. Petitioner is not contending that Trial Judges are constitutionally required in every case to voir dire Jurors about prejudicial conversations, rather that it was error of a constitutional nature to fail to do so under the circumstances of this case where the Judge was aware of specific instances of misconduct that created a significant likelihood that the Jury may have been affected or influenced. To sustain this contention it is

not necessary for the Petitioner to unquestionably establish that the Jurors were prejudiced. In such a situation:

> The focus is exclusively on whether the procedure used for testing impartiality created a reasonable assurance that prejudice would be discovered if present. *United States* v. *Dellinger*, 472 F2d 340, 367 (7th Cir. 1972).

The Petitioner asserts that with the knowledge of the specific instances of possible prejudice that had taken place here the procedures followed by the Trial Judge did not assure with any certainty that Jury prejudice or bias would be discovered, and that as a result LUTTETUS PERRY was denied a fair trial and an impartial Jury under the Sixth Amendment.

2. IT WAS A VIOLATION OF DUE PROCESS OF LAW TO ALLOW A GOVERNMENT WITNESS TO REHABILITATE HERSELF ON REBUTTAL WHEN SHE CHANGED HER PRIOR TESTIMONY TO CONFORM TO THE PROOFS INTRODUCED BY THE DEFENSE, AND WHEN THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN THAT SHE WAS BEING UNTRUTHFUL.

JUNE WRIGHT was a key prosecution witness whose uncorroborated testimony about the role of the Petitioner in the conspiracy was essential to his conviction.

During the Goverment's case-in-chief, MS. WRIGHT testified that: In December, 1973, when she went to Detroit with drugs for LUTTETUS PERRY, she stayed at the house of her father (T.316), DAVID ALLEN

(T.316) and later Petitioner took her to visit her brother, "BOBO" ALLEN (T.319); in February, 1974, when she again went to Detroit to deliver drugs to Petitioner (T.203), she took the drugs to the home of her Aunt, RUTH JACKSON, who lived at 2656 West Forrest (T.323); she had made phone calls in this case from the home of her uncle at 1227 Burlingame (T.346-347); in December, 1974 she was living in Detroit and spoke to Petitioner about drugs (T.266) at a home at 15715 Coyle she had purchased in October, 1974 (T.340); after her arrest in this case she had nothing further to do with drugs but became a song writer (T.292) and was supported by royalties from songs she had written (T.292,374.)

During the defense case-in-chief, it was disclosed that: DAVID ALLEN was not actually the father of JUNE WRIGHT (T.1089), he had no brother named HENRY ALLEN who lived at 1227 Burlingame (T.1091-1092), he had no son named "BOBO" ALLEN (T.1092), and no sister named RUTH JACKSON (T.1093); the song JUNE WRIGHT claimed to have written was not written by her (T.2152) and she had received no royalties from the company she had named (T.1254-1255);) 15715 Coyle had been owned by H.U.D. since 1972 (T.1273) and had never been purchased by a JUNE WRIGHT (T.1273) although a JUNE JACKSON had been evicted in June, 1975; there was no such address as 1227 Burlingame (T.1283) and the telephone number JUNE WRIGHT attributed to her uncle and to that address was held by another person in another city (T.1285); the address of 2656 W. Forrest did not exist (T.1286); and while RUTH JACKSON did live at 2653 W. Forrest (T.1290), she was not related to JUNE WRIGHT, had not seen her since 1971 (T.1292) and JUNE WRIGHT could not have been there in February, 1974 (T. 1293).

Over the objection of the defense (T.1299-1303), the Court allowed JUNE WRIGHT to re-testify on rebuttal. At this time, she said that: she had no relationship with record companies (T.1309), had not written the song in question (T.1332) and had received no royalties but was paid by a singer, one HAROLD MELVIN (T.1323); instead of buying the house at 15715 Coyle under her own name, she had only attempted to buy it as JUNE JACKSON (T.1316); the DAVID HENRY ALLEN who testified was no relation to her uncle, HENRY ALLEN (T.1329), who lived above 1225 Burlingame and the upstairs was difficult to locate (T.1344); her uncle's phone could be in the other city (T.1312), and; although she had lived at 2653 W. Forrest with the RUTH JACKSON who testified, that was not her aunt, RUTH JACKSON, who had lived across the street at 2656 W. Forrest (T.1312). When the defense made an offer of proof to show that JUNE WRIGHT was still lying in that HAROLD MELVIN would deny having any contractual relationship with her (T.1384), the Court would not permit him to be called as a witness (T.1383).

A) IT WAS IMPROPER REBUTTAL WHICH STRENGTHENED HER TESTIMONY TO ALLOW JUNE WRIGHT TO REHABILITATE HERSELF ON REBUTTAL WHEN SHE ALTERED HER EARLIER TESTIMONY.

When JUNE WRIGHT took the stand on rebuttal, she did not claim the defense witnesses were being untruthful nor did she introduce proof of prior consistent statements on her part. Instead, she significantly altered her

testimony so that it would conform to the facts presented by the defense. If JUNE WRIGHT had testified truthfully during the Government's case, there would have been no need for her to testify on rebuttal to attempt to patch the gaping holes that appeared in her story. All the evidence presented by the defense related to MS. WRIGHT's lies on direct and cross-examination, and when she was allowed to restructure her testimony on rebuttal, the evidence introduced by the defense was effectively rendered meaningless. The key of the defense was that MS. WRIGHT could not be believed, but once MS. WRIGHT was aware of the challenges to her credibility she was free to concoct any convenient means to avoid being labeled a liar. Having presented its case based on her direct and cross-examination testimony, the defense was deprived of the ability to challenge her revised testimony on rebuttal. When the petitioner offered to show on surrebuttal that MS. WRIGHT was not receiving money from a performer as she claimed thus establishing that her testimony was contrived and her tale of supporting herself without drugs was suspect, the Court refused to permit this evidence of her further deceit.

While the extent to which evidence may be received once the credibility of a witness has been attacked is normally within the discretion of the Trial Judge, *Beck* v. *United States*, 317 F2d 865, 870 (5th Cir. 1963), the Trial Judge here abused his discretion and the Petitioner was prejudiced thereby. JUNE WRIGHT's credibility was not restored by reputation evidence, by prior consistent statements, or by impeaching the impeaching witness, *Livergood* v. *S.J. Groves & Sons Co.*, 254 F. Supp. 879 (W.D. Penn. 1965), and she was not impeached by evidence of bias so as to mislead to the Jury concerning her veracity, thereby justifying her testimony

again on rebuttal. *Beck*, *supra*, at 869-870. Instead, JUNE WRIGHT was allowed to re-testify in rebuttal in a manner that completely negated the case the defense had presented. As JUNE WRIGHT was the key witness against the Petitioner, it was prejudicial to allow the Government a "second shot" when she had testified otherwise in the Government's case-in-chief. This was not a case where the rebuttal created ". . . no unfair advantage to the prosecution and no unfair surprise to the defense." *Beck*, *supra*, at 870.

In *Rodella* v. *United States*, 286 F2d 306, 309 (9th Cir. 1960), it was held that it was not prejudicial error to admit testimony in rebuttal which could have been offered as a part of the main case *unless* the party against whom the testimony is admitted is denied the right to controvert or contradict it. While *Rodella* did not involve the recalling of a Government witness so that in rebuttal she could change details she had already testified to, the language of the case still applies. Once the Petitioner had showed his hand by impeaching and contradicting JUNE WRIGHT, he was denied the right to controvert her revised testimony on rebuttal after she had learned which of her earlier lies had been discovered. While the defense could show that JUNE WRIGHT lied when she testified to taking drugs to the homes of DAVID HENRY ALLEN and RUTH JACKSON, making drug related calls from the home of her uncle, and discussing drugs with Petitioner at the home she purchased at 15715 Coyle, once JUNE WRIGHT learned of her earlier blunders, the defense was clearly unable to controvert her revised testimony that she had been referring to different people with identical names and that she had lived at the house in question under a different name. JUNE WRIGHT claimed that she was no longer

involved with drugs and lived off of royalties from songs she had written, but this was shown to be untruthful too. Although the Government thought this was an important enough issue for it to establish on rebuttal that her money actually came from a singer, the defense was denied the opportunity to prove that this testimony was also false. By allowing the Government witness to testify for a second time on rebuttal after hearing the defense, under the circumstances of this case the Petitioner was deprived of an opportunity to attack her credibility. To approve such a procedure is tantamount to requiring a Defendant do disclose his entire case before the Government begins its case-in-chief.

B) IT WAS A VIOLATION OF DUE PROCESS OF LAW FOR THE GOVERNMENT TO RECALL A WITNESS TO RE-TESTIFY ON REBUTTAL WHEN IT KNEW OR SHOULD HAVE KNOWN THAT HER TESTIMONY WAS FALSE.

On the Government's case-in-chief, JUNE WRIGHT gave one version of the circumstances surrounding the alleged delivery of drugs to and meetings with the Petitioner, as well as her means of supporting herself. Once flaws in her credibility developed, the Government approved, if not encouraged, a change of that testimony on rebuttal. The Government had completely failed to verify the information she had disclosed prior to trial, and when MS. WRIGHT was caught in lies it sat back and permitted her to conjure up additional facts. If the Government did not know MS. WRIGHT was lying at the time of her testimony on the case-in-chief, it certainly

should have known of those lies when it heard her proposed rebuttal testimony. Either the direct testimony or the rebuttal testimony had to be false, but the Government represented her to be truthful on both occasions. If the rebuttal testimony was untrue, the Government should not have presented it, and if the direct testimony was false, the Government should have forced an admission from MS. WRIGHT on rebuttal that she had lied earlier.

After the defense proved that MS. WRIGHT had lied in certain important respects, the U. S. Attorney requested that she be recalled as a rebuttal witness, and made an offer of proof as to what her testimony would be (T. 1297-1299). On rebuttal MS. WRIGHT stated that she had not known beforehand what she would be asked on rebuttal (T. 1316), and had not told anyone from the Government what her testimony would be (T. 1318-1319). Since the Government was able to make an offer of proof as to her rebuttal testimony when she had not discussed her rebuttal testimony, it is plain that the Government knew she was testifying falsely at the time of her contrary testimony during the case-in-chief but kept silent about it. If the Government was aware that JUNE WRIGHT was testifying falsely on either direct or rebuttal, there was a duty to disclose this to the Court and the Jury to prevent a miscarriage of justice. That the witness did not lie at the direction of the Government does not reduce the prejudice. JUNE WRIGHT should not have been allowed to manufacture convenient "clarifications".

In *Alcorta* v. *Texas*, 355 U.S. 28 (1957), the Defendant was convicted of murdering his wife with malice and was sentenced to death. The defendant had claimed he had become enraged upon seeing one Castilleja kissing his

wife and was guilty of the lesser offense of murder under passion. Castilleja testified that he and the wife were just friends. After the trial, Castilleja admitted that he had been intimate with the wife on many occasions but that when he had brought this to the prosecutor's attention he had been told not to mention it unless specifically asked. The Supreme Court found that under these circumstances the defendant had been denied due process of law and reversed the conviction. The testimony was seen as giving a false impression to the jury and as being prejudicial since it refuted the defendant's claim that he had killed his wife under passion.

Napue v. *Illinois*, 360 U.S. 264 (1959) was concerned with the testimony of a witness for the prosecution that he had not been promised anything in return for his testimony. The prosecutor knew that this was false but did nothing to correct it. The Supreme Court again found a due process violation and reversed the conviction, even though the false testimony went only to the credibility of the witness. *Napue, supra* at 269-270.

A U. S. Prosecutor should not be allowed to present any testimony for the rehabilitation of a witness regardless of its truth or credibility. If a witness has testified falsely, the Government should not resort to questionable means of concealing that fact. A Government Attorney is not an ordinary party to a controversy and has a duty to refrain from improper methods calculated to produce a conviction, *United States* v. *Polizzi, supra*, at 892.

The conduct of both JUNE WRIGHT and the Government should be found to have violated Petitioner's rights to a fair trial under the Due Process Clause of the Fifth Amendment. JUNE WRIGHT was a key prosecution witness whose uncorroborated testimony had

a great deal to do with the conviction of LUTTETUS PERRY. She was caught in lies about the details of her alleged drug deliveries to the Petitioner and her means of surviving independent of drugs was also shown to be untrue. Such falsehoods bore directly on her credibility and the improper means taken by the Government to obscure those lies gave the Jury a false impression of her credibility and veracity within the meaning of *Napue* v. *Illinois*, *supra*.

3. THE REFUSAL TO INSTRUCT ON MULTIPLE CONSPIRACIES WHERE THE JURY COULD REASONABLY HAVE FOUND A VARIANCE BETWEEN THE INDICTMENT AND THE PROOF WAS CONTRARY TO THE RULINGS OF OTHER CIRCUITS AS WELL AS THIS COURT.

LUTTETUS PERRY was jointly tried with four (4) other Defendants for conspiring with numerous others to violate Federal Narcotics Laws. The evidence at trial failed to link the Petitioner directly to any of the other Defendants or to any of the other unindicted co-conspirators other than EDWARD PERRY. All that the evidence disclosed was that LUTTETUS PERRY had received drugs from EDWARD PERRY on two or three occasions.

RAUL LEON-AISPURO, a Mexican citizen, supplied drugs to a number of unknown people in the United States. JOSE SANCHEZ was an associate in this operation (T. 133-153). MARISA SANCHEZ, as the

sister of JOSE SANCHEZ, was able to obtain drugs for her husband, EDWARD PERRY (T. 133). HECTOR MENDOZA and DONALD FOUCHE delivered drugs to MARISA SANCHEZ and EDWARD PERRY for JOSE SANCHEZ and RAUL AISPURO (T. 133). JUNE WRIGHT, LARRY JACKSON and ELISE WILLIAMS were said to have delivered drugs for EDWARD PERRY to LUTTETUS PERRY and the other Defendants, but the Petitioner was not shown to have known or dealt with any of the aileged conspirators other than EDWARD PERRY and his couriers.

HECTOR MENDOZA, a major source of supply to EDWARD PERRY from RAUL AISPURO, had never delivered drugs to LUTTETUS PERRY or any of the Defendants, and had never even seen any of them before the trial (T. 146-153).

DONALD FOUCHE, who held the inventory of drugs and thus controlled the heart of the AISPURO organization, had never made deliveries to LUTTETUS PERRY. FOUCHE never mentioned LUTTETUS PERRY during his testimony. FOUCHE kept coded records of the transactions he was involved in, and those entries he was questioned about made no reference to the Petitioner (T. 930).

MARISA SANCHEZ who acted as a sort of liaison between EDWARD PERRY and others, also kept a coded record of the transactions she was involved in on behalf of EDWARD PERRY. Her records did not mention LUTTETUS PERRY or any of the other Defendants. (T. 475).

Neither did ELISE WILLIAMS implicate LUTTETUS PERRY in a single scheme with others. It was her testimony that she met THEODORE WARE through

EDWARD PERRY and that she had observed, and participated in, drug dealings between the two (T. 484, 514-515). She did not involve LUTTETUS PERRY in any manner. If anything, her testimony about separate and unrelated drug transactions between EDWARD PERRY and THEODORE WARE on the one hand and EDWARD PERRY, MICHAEL IRWIN and BRIAN WINTERS on the other hand only emhasizes the contention that there was no common plan or that LUTTETUS PERRY was not a party to such a plan.

Of all the witnesses, only JUNE WRIGHT and LARRY JACKSON implicated LUTTETUS PERRY in any manner, and their testimony linked him to EDWARD PERRY alone rather than the other alleged conspirators.

Although he was requested to do so by Petitioner's counsel (T. 1241-1245), JUDGE NIELSEN refused to instruct the Jury on single versus multiple conspiracies (T. 1245). Along with other related points, the instruction requested consisted of a charge to the effect that a Defendant who was not shown to be a member of the single conspiracy contained in the Indictment could not be convicted, even if his involvement in other conspiracies was proven, as well as the fact that evidence of separate conspiracies, other than the conspiracy charged, in which he did not participate, could not be considered against him.

JUDGE NIELSEN was of the opinion that it was sufficient if the Jurors were informed that the Defendants had to be found guilty of the conspiracy charged beyond a reasonable doubt (T. 1242). The Court felt that the existence of other conspiracies was a matter to be raised by counsel during argument to the Jury (T. 1241). The Judge did not instruct on the distinctions between one

mass conspiracy and several separate but similar conspiracies, or was the use to which evidence of separate conspiracies could be put ever discussed (T. 1628-1640).

The gist of the offense of conspiracy is an agreement to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *United States* v. *Falcone*, 311 U.S. 199, 210 (1940).

In the instant case, the Indictment charged that the five (5) Defendants, along with others not being tried, were co-conspirators in a single scheme to possess heroin for distribution. To support this single conspiracy charge, the parties had to be shown to be " . . . working together understandingly, with a single design for the accomplishment of a common purpose." *Fowler* v. *United States*, 273 F. 15, 19 (C.C.A. 9 1921); *Marino* v. *United States*, 91 F2d 691, 694 (9th Cir. 1937).

Instead of a single band of conspirators united for the accomplishment of a common purpose, the evidence disclosed a number of individuals, far in excess of the five (5) Defendants, who were unaware of one another's existence and working solely toward their own personal goals. They happened to have certain people in common who provided the means of achieving their similar but independent objectives.

The test for whether a single conspiracy or multiple conspiracies has been shown was stated in *United States* v. *Ellsworth*, 481 F2d 864, 869 (9th Cir. 1973) as:

> . . . Whether there was one overall agreement among the various parties to perform various functions in order to carry out the objectives of the conspiracy; if so, there is a single conspiracy.

The Government failed to show that the Petitioner worked directly with the other alleged conspirators to promote the overall scheme charged. LUTTETUS PERRY was shown to have dealt with no one other than EDWARD PERRY and his agents. According to *United States* v. *Baxter*, 492 F2d 150, 158 (9th Cir. 1973), it appears that a conviction would be proper in such circumstances only if the Defendant had reason to know of the single scheme and had reason to believe that his own benefits were dependent on the success of the entire venture. However, his principle must be carefully applied. It is not sufficient if the Government merely shows that some of the Defendants entered a conspiracy with some of the other indicted co-conspirators. Each Defendant must be shown to have participated in a single conspiracy charged. *Baxter, supra*, at 159.

Unlike *Baxter, supra*, the evidence here, even when considered in the light most favorable to the Government, proved that LUTTETUS PERRY had direct contact regarding narcotics only with EDWARD PERRY through his agents or employees. Thus, there was a serious question of whether the Petitioner's involvement with EDWARD PERRY alone was sufficient by itself to put him on notice of the mass conspiracy to distribute narcotics and of his dependence on its success.

Whether a scheme is one conspiracy or several is primarily a Jury question, since it is a question of fact as to the nature of the agreement. *United States* v. *Crosby*, 294 F2d 928 (2d Cir. 1961); *United States* v. *Dardi*, 330 F2d 316 (2d Cir. 1964). This being so, the Court should instruct the Jury on multiple conspiracies when the possibility of a variance between the indictment and the proof appears. *United States* v. *Varelli*, 407 F2d 735, 746 (7th Cir. 1969); *United States* v. *Johnson*, 515 F2d 730 (7th Cir. 1975).

Here, there was more than just the possibility that a variance could be found. Based on the proofs, if the Jury had been properly instructed in this regard, the Jurors could reasonably have found that the Petitioner's involvement with EDWARD PERRY did not put him on notice of the single conspiracy charged and that the Defendants were actually shown to be parties to any number of separate agreements. Where the evidence is ambiguous as to the scope of the agreement made by a particular defendant charged with conspiracy and the issue has practical importance, the Court must focus the Jury's attention on that issue. *United States* v. *Borelli*, 336 F2d 376, N.4 386 (2nd Cir. 1964). JUDGE NIELSEN gave no such instruction.

In *United States* v. *Griffin*, 464 F2d 1352 (9th Cir. 1972), one conspiracy was charged but several were proven. The Ninth Circuit found no error but that the decision was greatly influenced by the fact that the Trial Judge had instructed on multiple conspiracies and explained that evidence of separate conspiracies could not be considered against Defendants not proven to be members of those conspiracies. The charge given was set out at 1357. The instruction approved in *United States* v. *Tramunti*, 513 F2d 1083, 1107 (2d Cir. 1975) is even more detailed than that in *Griffin, supra*.

JUDGE NIELSEN's instructions cannot be said to approach in spirit, or in words, those contained in either *Griffin, supra*, or *Tramunti, supra*, and reflect the position taken by the District Judge in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). There, the Trial Court had been of the view that one conspiracy was made out. The Supreme Court held that the instructions given under this theory were erroneous in that the Jury could find a single common plan, when none was shown

by the proof, and the Jury was free to impute to each Defendant the acts and statements of others even if they related to a different scheme. *Kotteakos*, *supra*, at 769-771.

While the facts here are different than those in *Kotteakos*, *supra*, as a single conspiracy could be found to exist, it is also true that the Jury could reasonably have found that the single conspiracy charged was not proven. For the same reasons advanced in *Kotteakos*, *supra*, the Petitioner was denied a fair trial by the instructions in the case at bar.

Instead of being given some meaningful criterion for determining single versus multiple conspiracies, the instructions to the jury permitted them to confuse "the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character," and allowed the jury to bind the Petitioner with the acts and declarations of the other alleged co-conspirators without first being able to intelligently determine whether all the parties involved were participating in the single common plan charged or off on their own adventures.

LUTTETUS PERRY was claimed to be a member of a conspiracy involving many others, including the four (4) other Defendants. The evidence against the five (5) Defendants was separate and distinct. Few, if any, contacts between them were shown to have existed. If the Jury had been informed of the distinctions between one mass conspiracy and many separate agreements, and if the Court had marshalled the proofs against each Defendant, the Jury could reasonably have found at least five (5) separate conspiracies between the Defendants and EDWARD PERRY and any number of agreements between EDWARD PERRY and the others charged, but not tried, as co-conspirators.

An accused is entitled to instructions on every theory which he puts forward and supports by evidence, *United States* v. *Dye*, 508 F2d 1226 (6th Cir. 1974), and by refusing to instruct on multiple conspiracies the Petitioner was denied this right as well.

CONCLUSION

For the foregoing reasons, Petitioner, LUTTETUS PERRY, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

BELL, McSORLEY, HUDSON
& DANIEL, P.C.
By: EDWARD F. BELL
Attorneys for Petitioner,
LUTTETUS PERRY
Suite 840 — Buhl Building
Detroit, Michigan 48226
(313) 393-0900

Dated: May 23, 1977

APPENDIX "A"

OPINION OF THE NINTH CIRCUIT COURT OF APPEALS

(United States of America vs.
Lettetus Perry, a/k/a Ted Perry, et al.)

(January 31, 1977)

Before: ELY and ANDERSON, Circuit Judges, and SOLOMON, * District Judge.

ANDERSON, Circuit Judge:

On August 15, 1975, the Federal Grand Jury for the Southern District of California returned a criminal indictment charging defendants and nine others with conspiracy to illegally import heroin and cocaine (Count One), and conspiracy to possess heroin and cocaine with intent to distribute (Count Two). [21 U.S.C. 952, 960, 963, 841 (a) (1) and 846].

Defendants Perry, Bradley, Ware and Winters proceeded to jury trial on October 7, 1975. Defendant Erwin waived his right to a jury trial and his case was heard by the court. At the close of the government's case the defendants moved for acquittal. The trial court granted the motion as to Count One only.

On October 31, 1975, the jury found defendants guilty on Count Two. On November 3, 1975, the trial court found defendant Erwin guilty on Cou;nt Two.

Defendants appeal their convictions, raising numerous issues to be discussed *infra*. Jurisdiction rests with 28 U.S.C. 1291 and 1294. We affirm as to all defendants.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Briefly, the evidence, viewed favorably to the government, shows that all of these defendants were involved in a complex and sophisticated operation involving smuggling and distribution of illegal narcotics, primarily heroin and cocaine. The narcotics originated in Mexico under the control of one Juan Leon-Aispuro. Couriers of Aispuro would then smuggle the narcotics across the border into the United States, usually Southern California. The narcotics would then be delivered to the defendants or delivered to one Edward Perry (cousin of defendant Perry), who acted as warehouseman, wholesaler and distributor. The defendants in this case played the role of satellite retailers in this operation. Some were located in different parts of the country. They obtained the narcotics either from Edward Perry himself or from couriers working for him. Other relevant factors will be presented as they relate to the issues raised.

I. VOIR DIRE OF THE JURY

During the jury selection process and after prospective jurors had been sworn, the trial court inquired of the jurors whether they would be able to follow his instructions on the law that was to govern. Juror Johnson expressed that while he would be willing to follow the law, he had already formed an opinion in the case. He felt this way from reading his morning paper and overhearing a conversation between two young ladies. When this juror expressed to the court that he felt he could not fairly try the case, he was dismissed.

Out of the presence of the jury, defense counsel requested that the court inquire of all the jurors whether

they had heard any comments or remarks along those lines and, if so, what impact it would have on them as jurors.

The court responded:

> "I don't propose to do that gentlemen. I think that would be making a mountain out of a molehill. I have asked them about whether they could be fair and impartial and whether they were willing to have their own case tried by jurors in the same frame of mind that they are now in. I think it would emphasize the situation and be very detrimental rather than beneficial. I think you are better off, all of us are, if we just act as if that had not happened." (R.T. 49-50).

Later, just as the jury was being excused for the day, Juror Zubricky mentioned to the court that he had overheard a man talking in the hall. Zubricky was questioned in chambers out of the presence of the jury. When asked if he had been talking to the previously-excused juror, he said no, but that he had been talking to another juror on the panel, a Barbara Van Dorn. Zubricky stated that he had "whispered" to Van Dorn that he had a daughter hooked on marijuana and that he hoped he wouldn't be picked for the jury because he "was not in favor of it at all." (R.T. 52). Zubicky stated that Van Dorn made no response, but was only listening. Zubricky was then released for cause. Defense counsel again requested that the court inquire of the jurors whether they had discussed the case or formed an opinion of the case based on anything said that day. The court refused because he didn't feel there was any reason for it. He also refused to give defense an additional peremptory challenge with which to challenge Juror Van Dorn.

Defendants[1] now contend on appeal that the trial court committed reversible error by not making further inquiry of the jury, especially Juror Van Dorn, or giving the defense an additional peremptory challenge. Defendants also contend that the trial court erred by refusing to grant defendants' motion for a mistrial.

We find no reversible error committed by the trial judge in his handling of the voir dire of the jury. As this court stated in *United States v. Silverthorne*, 430 F. 2d 675, 678 (9th Cir. 1970), *cert. den.*, 400 U.S. 1022 (1971):

> "Appellate courts will not interfere with the manner in which the trial court conducted the *voir dire* examination unless there has been a clear abuse of discretion."

See also Ristaino v. Ross, 424 U.S. 589, 594 (1976). We find no such abuse of discretion in this case which, it should be noted, does not involve substantial pretrial publicity. *Compare United States v. Silverthorne, supra*, with *United States v. Polizzi*, 500 F. 2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). The trial court went to the lengths necessary to provide a fair and impartial jury. He is the one closest to the situation and can best evaluate the proper method to determine if there is any bias or preconceived opinions held by the jury. He is best able to walk that fine line between first questioning the jury to find bias and then later specifically requestioning the jury to the extent that confusion and bias are *created* in the jury by suggesting the existence of controversial issues which may or may not exist. *See United States v. Polizzi, supra*, at 880. The record reflects that any possibility of bias or partiality on

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[1]Erwin lacks standing to challenge any alleged errors relating to the jury since he waived trial by jury.

the part of any juror is at best speculative. Initially, the court properly declined to inquire of the remaining members of the jury panel whether they also overheard the ambiguous conversation alluded to by Mr. Johnston. Johnston's comment had been made in open court before the jury panel, yet failed to evoke similar reaction from others. To delve in to the possibility that others might have overheard the conversation would have been a fishing expedition that would have suggested to the panel the presence of highly prejudicial information. Mr. Zubricky's subsequent comments added nothing to what the trial judge already knew about the incident in the hallway; hence, he quite appropriately maintained his opinion that no significant event of pretrial publicity had occurred. Moreover, we do not believe that the court was obligated to bring Juror Van Dorn into chambers and inquire whether she formed an opinion based upon what Zubricky had said to her. The reference to his daughter's use of marijuana did not relate to an opinion as to guilt or innocence of the defendants, but rather only concerned a personal problem unfortunately shared, perhaps, by many parents.

Thus, the trial court properly exercised his discretion in questioning the jury and denying the motion for a mistrial. The appellants were not deprived of a fair trial because of the situation presented on this record.

II. SUFFICIENCY OF THE EVIDENCE

Defendants contend that the evidence produced at trial was insufficient to establish that they participated in the single conspiracy charged in the indictment. They argue that the government has not shown that each of the defendants worked directly with each other nor even

shown that all of the defendants knew each other. However, under the law of this circuit such a showing is not necessary. The government is not required to show direct contact or explicit agreement between the defendants. For the convictions to stand, the government must produce enough evidence to show that each defendant knew *or had reason to know* the scope of the distribution and retail organization involved with the illegal narcotics, and had reason to believe that their own benefits derived from the operation were dependent upon the success of the entire venture.

The instant case closely parallels *United States v. Baxter*, 492 F. 2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). In *Baxter*, we dealt with a factual situation very similar to the instant case; that is, a large narcotics smuggling and distribution organization. There, as here, defendants were the retail end of the chain and they also contended that the evidence was insufficient to establish that the individual defendants participated in an overall conspiracy as charged in the indictment. In answer to this claim, we specifically stated:

> '. . . the Government did not, for the most part, prove direct contact and connivance between the defendant retailers. However, even though the defendant retailers did not directly conspire with each other in this over-all undertaking, if each knew, or had reason to know, that other retailers were involved with the Hernandez organization in a broad project for the smuggling, distribution and retail sale of narcotics, and had reason to believe that their own benefits derived from the operation were probably dependent upon the success of the entire venture, the jury could find that each had, in effect, agreed to participate in the over-all

> scheme. [citations omitted] This would be true even though the individual defendants were not aware of the identity, number or location of the other participating retailers." 492 F. 2d at 158.

Upon complete review of the record in this case, we find that the jury (and the trial judge in Edwin's case) could rationally conclude that there was a general conspiracy as charged in the indictment. Once a conspiracy has been found to exist, only slight evidence is necessary to connect a defendant to it. *United States v. See*, 505 F. 2d 845 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *United States v. Knight*, 416 F. 2d 1181, 1184 (9th Cir. 1969).

When we view the evidence in the light most favorable to the government, as we must, *Glasser v. United States*, 315 U.S. 60 (1942), we find that it is amply sufficient to show that defendants were members of the general conspiracy charged in the indictment. For example, the record discloses that defendant Perry was a major narcotics trafficker in the Detroit, Michigan, area. On at least two different occasions defendant Perry accepted deliveries of narcotics from Edward Perry and once argued the method of payment for the narcotics over the telephone. He also personally contacted and met with Edward Perry on several different occasions.

As for defendant Bradley, the evidence sufficiently establishes that he was a prime member of the conspiracy. He was a courier of narcotics. He delivered them at least once to Salt Lake City. The record also discloses that Bradley twice accepted delivery of narcotics from another courier who was working for the Aispuro organization in Mexico, and, for a part of the time, he was a partner with wholesaler Edward Perry in the narcotics business.

The evidence also connects defendant Ware to the conspiracy and to Edward Perry. On several different occasions narcotics were delivered to Ware by couriers of Edward Perry or by Edward Perry himself. Some of these were on "consignment" which indicates that Ware was a trusted retail outlet and received these drugs for resale after which he would repay Edward Perry for the narcotics. One time Ware couldn't come up with the money for previously-supplied narcotics. While Edward Perry was upset with Ware for not having the money, he agreed to supply Ware with some more heroin to enable Ware to make up the debt from his profit on future sales.

The evidence is also sufficient to connect defendants Winters and Erwin to the conspiracy. Both openly concede that at least one pound of cocaine was delivered to them by a courier of Edward Perry. This cocaine was apparently of inferior quality and could not be sold. They, and other co-conspirators, were to lose $12,000.00 on this bad package of cocaine. They decided that they would have to make up this loss among themselves with their future narcotic transactions. Winters and Erwin were also seen together at different co-conspirators' houses and once attended a party where many co-conspirators were present, including Edward Perry and defendant Perry.

From this and other evidence presented at trial, it is clear that this is more than the slight evidence needed to connect all of the defendants to the conspiracy.

III. VARIANCE

Defendants contend that the proof at trial showed several conspiracies rather than the one conspiracy charged in the indictment. They argue that this is a

variance which prejudiced their substantial rights and requires reversal. We disagree. Because we have found, after a reading of the record in this case, that the jury could rationally conclude that there was one general conspiracy and that defendants were members of it, we find that there is no variance between the indictment and the proof adduced at trial which prejudiced defendants' rights. *United States v. Baxter, supra*, p. 160.

Defendants rely on *Kotteakos v. United States*, 328 U.S. 750 (1946). However, the instant case is quite different from the facts which exist in *Kotteakos*. There, thirty-two persons were indicted for a single conspiracy to violate the National Housing Act by inducing lending institutions to make loans which could be offered to the Federal Housing Administration for insurance on the basis of false and fraudulent information. The evidence proved at least eight different conspiracies consisting of several defendants whose only connection with each other was that all had their fraudulent applications handled by a broker named Brown. Each of these agreements with Brown was a completely separate agreement and had its own distinct illegal end. Except for Brown, the common figure, no conspirator was interested in whether any loan except his own went through. This is different from the instant case in that here the jury could find that each one of the defendants knew or should have known that other retailers were involved and that each had reason to believe that what benefits he received were probably dependent upon the success of the entire venture. *United States v. Baxter, supra*. The retailer defendants here are much more interested and involved in the general conspiracy than those defendants in *Kotteakos, supra*. For these reasons, we also distinguish *United States v. Griffin*, 464 F. 2d 1352 (9th Cir.), *cert. den.*, 409 U.S. 1009 (1972).

IV. REBUTTAL TESTIMONY

One of the key witnesses for the prosecution was June Delores Wright. She was a co-conspirator and primarily acted as courier of narcotics for Edward Perry. She took the stand and testified about her own and defendants' involvement in the conspiracy. She also testified as to several collateral matters such as her occupation, her residence and who her relatives were. The defense then presented several inconsistencies in her testimony on these collateral matters. The trial court allowed the prosecution to put Wright back on the stand as a rebuttal witness where she "clarified" the inconsistencies which had been presented.

Defendants contend that Wright's rebuttal testimony was improper and that the trial court abused his discretion by allowing her to retake the stand. We disagree. The extent to which counteracting and rehabilitative evidence may be received after the credibility of a witness has been attacked is a matter in which the trial judge necessarily has broad discretion. *Beck v. United States*, 317 F. 2d 865, 870 (5th Cir. 1963), *cert. denied*, 375 U.S. 972 (1964). The key issue in this instance is the credibility of Witness Wright. If, during rebuttal testimony on the stand, she were to change parts of her earlier testimony (which is what the defense is contending), this would reflect on her credibility, which is one of the ultimate questions for the jury to decide. Defendants' counsel were allowed great latitude in their cross-examination of Witness Wright into collateral matters. We cannot find that any of the defendants were prejudiced because she was allowed to take the stand in rebuttal. This was no abuse of discretion by the trial court. Federal Evidence Rules, 104 (e) and 611 (a) (1).

The contention that the prosecution participated in a ruse to fabricate Wright's testimony, or failed to disclose the falsity of testimony known to it, is not supported by the record.

V. NONDISCLOSURE OF THE IDENTITY OF WITNESS LARRY JACKSON'S FRIENDS

During direct examination of co-conspirator and government witness Larry Jackson, he mentioned that friends of defendant Ware, Ware's wife, and Jackson sometimes stopped by the house and consumed narcotics. On cross-examination, counsel for the defense demanded that Jackson reveal the names of these friends. The trial court ruled that Jackson did not have to reveal the names because they were irrelevant. Defendants contend that they have been denied their right to confrontation of witnesses against them. However, this right necessarily only extends to issues which are relevant to the trial at hand. The trial court is the one best able to determine whether the evidence is relevant or whether counsel is merely fishing amidst the irrelevant evidence hoping to find something of relevance. It is well-established that the scope and extent of cross-examination is within the trial court's sound discretion. *United States v. Bagsby*, 489 F. 2d 725 (9th Cir. 1973). We find that the identity of Jackson's friends was of questionable relevance and that the trial court properly exercised his discretion in limiting cross-examination in this area.

VI. JURY INSTRUCTIONS

Defendants contend that the proof at trial showed multiple conspiracies, while the indictment only charged one general conspiracy. The trial court instructed the jury

on the usual conspiracy instructions to the effect that the conspiracy offense is complete when the jury finds beyond a reasonable doubt that the conspiracy existed, that there was an overt act, and that the defendants were willing members of it. The trial court refused to give defendant Perry's requested instruction which read:

> ". . . if you should find from the proofs in this case that there are two or more disconnected conspiracies, you must not find the defendants in this case guilty of the conspiracy charged in the indictment."
>
> (Clerk's Transcript, p. 30)

We find that this multiple conspiracy instruction incorrectly states the law and the trial court, therefore, properly refused it. The crucial point that defendants miss in this case is the fact that the jury could find that there were several different agreements involving the defendants, all of which would then connect the defendants to the general overall conspiracy as charged in the indictment. The government does not have to prove that all of the defendants met together at the same time and ratified the illegal scheme. This just is not the nature of a conspiracy; especially a large narcotics smuggling and distribution organization as we have here. Generally, the defendants are going to meet and conspire in twos or threes in order to carry out the design of the common overall scheme. To suggest that defendants should be acquitted of the general conspiracy charge just because some of them met singly with other defendants and conspired with them to carry out the overall common distribution plan is a misapplication of the law of conspiracy. By these separate agreements the defendants became parties to the larger common plan, joined together by their knowledge of its essential features and

scope, though not of the exact limits, and by their single goal. These agreements were merely steps in the formation of the larger and more general conspiracy. *See Blumenthal v. United States*, 332 U.S. 539 (1947).

We do not mean to suggest that a *correct* instruction on multiple conspiracies would be improper in this and similar cases. When the possibility of a variance appears between the indictment and the trial proof, the trial court should instruct the jury on multiple conspiracies. *United States v. Varelli*, 407 F2d 735, 746 (7th Cir. 1969). *See e.g. United States v. Griffin, supra*. However, because of our finding, *supra*, that there is no such variance in the instant case, the failure of the trial court to instruct on multiple conspiracies caused no harm or prejudice to the defendants and, as such, is not reversible error.

Other contentions raised by defendants have been studied and we find them to be without merit.

AFFIRMED.

APPENDIX "B"

ORDER OF THE NINTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING

(United States of America vs.
Lutteus Perry, a/k/a Ted Perry, et al.)

Before: ELY and ANDERSON, Circuit Judges,
and SOLOMON,* District Judge.

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35 (b)

The petitions for rehearing are denied and the suggestion for a rehearing en banc is rejected.

Dated: April _____, 1977.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.